Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 76-452

ALF KEY, ROSCOE KEY, JR., PETER ANDREW KEY, JOE ALFONZIA KEY, PAUL KEY, TOM KEY, JR., LOUISE KEY MASON, GEORGIA KEY BOLDEN, WALDO H. HERMAN, and GILBERT JOHNSON

Petitioners,

V.

WILLIAM C. KEADY, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF MISSISSIPPI, and LOUIS WISE, AMY WISE PERMENTER, FANNIE WISE KORTJOHN, VIRGINIA C. WISE, LOUISE P. WISE, DR. LOUIS J. WISE, LOUIS PAUL FISCHER, EUGENIA FISCHER, MAX J. HEINBERG III, MRS. PAULINE HEINBERG GAGLIANO, CHARLES E. HEINBERG, WILLIAM W. HEINBERG, MRS. EUGENIA F. HEINBERG, THE UNITED STATES OF AMERICA,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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IN THE

Supreme Court of the United States

ALF KEY, et al,

Petitioners,

VS. No._____

WILLIAM C. KEADY, JUDGE, et al

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on June 28, 1976.

OPINIONS BELOW

The memorandum opinion of the District Court for the Northern District of Mississippi, Greenville Division, on defendants' motions for dismissal, is unreported (App. page 31); and the order on said motions for dismissal is also unreported (App. page 32). The order of the District Court on Petitioners' motion to reconsider is unreported (App. page 38).

There were no opinions rendered by the U.S. Court of Appeals for the Fifth Circuit. An order, not here complained about, was entered by said Court dismissing plaintiff's appeal from the aforementioned District Court decisions (App. page 39).

JURISDICTION

The order of the Fifth Circuit Court of Appeals denying petitioners' application for a writ of mandamus was made and entered the 24th day of May 1976 (App. page 56). The order of the Fifth Circuit denying petitioners' application for a rehearing of the May 24th decision was made and entered on the 28th day of June 1976 (App. page 57). The jurisdiction of this Court is invoked under 28 *USC* 1254 (1).

QUESTIONS PRESENTED

In a suit against the United States and other defendants to adjudicate a disputed title to real property located in Humphreys County, Mississippi, in which jurisdiction was invoked both under diversity of citizenship, and the newly enacted Public Law 92-562, 92nd Congress, S. 216 Oct. 25, 1972, the District Judge for the Northern District of Mississippi found jurisdiction, and still retains jurisdiction. However, he entered an order of abstention, which provided that any of the parties could file suit in state court to confirm title within 90 days. The defendants did thereafter file suit in the Mississippi State Courts, where the case is still pending and has not been finally resolved.

This suit involves the title to 451 acres of land which lies along the banks of the Yazoo River, a navigable

stream. Some nine and eleven years before suit was filed, the United States acquired by two perpetual easement deeds, the right to build and maintain levees on said land, including the right of ingress and egress to the levees across the land not purchased. The questions presented are:

1. Whether Congress has conferred exclusive original jurisdiction to the United States District Courts to determine the issues here in controversy, to the exclusion of state court.

2. May the United States Courts opt to abstain from hearing and deciding the issues so that a state court may decide them.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

Public Law 92-562, 92nd Congress, S. 216, dated October 25, 1972, which has been incorporated verbatim as part of 28 *USC* 1346; 28 *USC* 1402; and 28 *USC* 2409.

STATEMENT

The plaintiffs in this case, all black citizens whose ancestors came from Mississippi, sought to have the United States District Court for the Northern District of Mississippi adjudicate a disputed title to real property in which the United States claims an interest (other than a security interest or water rights). They named as defendants the United States of America and several white defendants, all descended from certain

money lenders who claim the property as adverse possessors.

Suit was filed in 1972, about two years after said defendants took the physical possession of the real property in question. The suit as originally filed on 21 July 1972 invoked federal jurisdiction solely upon diversity of citizenship (App. page 16).

The white defendants on 21 August 1972 moved to dismiss by challenging the right to bring a suit against the United States and by challenging the fact of diversity of citizenship (App. page 22). The United States on 22 September 1972 moved to dismiss on the grounds that 28 *USC* 2410 does not give the Court jurisdiction of the suit, and that the Perpetual Easement Agreements under which the Government claims an interest in and to the lands in question were filed more than six years (though less than twelve years) before this suit was filed, and therefore said claims are barred. (App. page 23). The civilian defendants thereafter on 12 October 1972 filed a supplemental motion to dismiss (App. page 25), which added no new defenses.

On 25 October 1972, Public Law 92-562 (App. page 28) became the law of the land, amending 28 *USC* 1346, 28 *USC* 1402 and 28 *USC* 2409. On 22 November 1972, the District Court held a hearing on said motions, considered the new Public Law 92-562, and by its opinion (App. page 31) overruled the motion of the United States to dismiss, and held that as between the private litigants there did appear to be a diversity of citizenship, but that because state law questions regarding titles to real estate predominate, it is a proper case for abstention, and that the private litigants should file suit in

state court to confirm their title. In its order on that opinion (App. page 32), The District Court overruled all motions to dismiss, suspended further proceedings therein, and gave either party 90 days within which to file suit in state court.

On 21 December 1972, plaintiffs moved the District Court to reconsider its abstention ruling, for permission to amend its original complaint (App. page 34) so as to rely upon the new Public Law 92-562 and other grounds as bases for federal jurisdiction, and in the alternative to be allowed to rely upon federal court discovery rules in the state court trial (App. page 35). An amendment to said motion to reconsider was filed on 26 February 1973 (App. page 37), in which it alleged that the defendants had indeed filed a state court suit, and praying the District Court to enjoin further state court proceedings until the jurisdiction questions therein raised had been resolved. Without a hearing thereon, the District Judge, on 27 February 1973, ordered that plaintiffs' motion was not well taken, that the state court suit should be allowed to proceed but without prejudice to the rights or interests claimed by the United States, and that after final outcome of the state court litigation, counsel are to notify the Court of the issues remaining. (App. page 38).

The appeal of that decision was dismissed, without opinion, by the Fifth Circuit Court of Appeals on 12 June 1973. (App. page 39).

On the 19th day of June 1973, a trial was begun in the Mississippi Chancery Court, and ended four days later. The Mississippi Chancellor filed his Findings (App. page 40) and Final Decree (App. page 42).

against these plaintiffs, on 10 September 1974, some fifteen months later. That decision is now on appeal and still pending before the Mississippi Supreme Court.

On or about Friday the 21st day of May 1976, these plaintiffs filed their Petition for a Writ of Mandamus before the Fifth Circuit Court of Appeals, praying in effect that the United States District Court be declared to be the sole and exclusive forum to determine the issues of this case. (App. Page 47). That petition was overruled, without opinion, some three days later, on 24 May 1976. (App. page 56). The plaintiffs' petition to rehear was also denied, without opinion by the Fifth Circuit, on 28 June 1976. (App. page 57).

The above recited facts, which appertain to the question of whether this case should be tried in federal or state court, are not in dispute. The facts as to which parties are entitled to prevail in the title dispute, are very much in dispute, but are not before this Court.

Plaintiffs are all black non residents of Mississippi. Their ancestors were in possession of the land in question from about 1888 until the last operator died in 1970. The United States claims from deeds from the white defendants, who never took actual possession of said lands until 1970. Thus, if the civilian defendants have no adverse possessory claims to the lands, then the claim of the United States must fail also.

REASONS FOR GRANTING THE WRIT

The decision of the Fifth Circuit Court of Appeals should be reviewed because it erroneously allows a district court to circumvent an act of Congress. There has been an increasing tendency of federal courts, in

those cases where federal and state jurisdiction happens to be concurrent, to abstain in favor of the state court. It is doubtful whether any state court has ever exercised the same power. In this case, Public Law 92-562 grants the exclusive original jurisdiction thereof to the United States District courts. Such a grant must also be taken to exclude such jurisdiction to any state court. Thus the error of the Court below is two-fold: it refused to accept the exclusive jurisdiction granted it by the solemn law of this land; and, it allowed the case to be sent to a court which has no jurisdiction to try the issues.

If the decision of the Fifth Circuit is proper, the federal courts, not Congress, may decide the extent of their own jurisdictional limitations.

"The judicial power of the United States shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish." Article 3, Sec. 1, U. S. Constitution.

From the earliest times, that section has been taken to mean that Congress, not the Courts, is the sole source of judicial power to inferior federal courts. The congressional power to "ordain and establish" inferior courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. *Lackerty v Phillips.*[1] Federal district courts are not courts of general jurisdiction but to the contrary their jurisdiction is limited and their powers lie dormant until jurisdiction is conferred by Congress under its constitutional authority and Congress, in its

[1] 319 US 182, 63 S Ct 1019, 87 LEd 1339 (1943).

unlimited discretion, may give, withhold, restrict or take away altogether jurisdiction of district courts of the United States. *Steckel v Lurie.*[1] Congress determines the scope of jurisdiction of the lower federal courts. *Federal Power Commission v Pacific Power & Light Co.*[2] Never has it been held that a federal court has the power to establish, diminish or increase its jurisdiction.

Congress, by the exercise of its power under the Constitution, may restrict the jurisdiction of state courts. *City of Indianapolis v Chase National Bank of New York.*[4]

Though the federal courts never pretended to establish, diminish nor increase their jurisdictional powers, they did in fact begin to decide that in some cases they would not exercise the jurisdiction Congress had bestowed upon them. And they did this under the judicially created "doctrine of abstention." But the doctrine could only be invoked when there was concurrent jurisdiction in both the state and federal court as to a particular case or controversy.

Ashman, Alfine and Shapiro, in *Federal Abstention: New Perspectives On Its Current Vitality,*[5] point out that recent developments within the federal judicial system have contributed to even greater uncertainty as to the distribution of power between the federal and state judicial systems. And, the most significant development appears to be the dramatic increase in the workload of the federal district courts. The article focuses upon the increased use of federal trial court

[2] (CA Ohio), 185 F 2d 921 (1950).
[3] 307 US 156, 59 S Ct 766, 83 LEd 1180 (1939).
[4] 314 US 63, 62 S Ct 15, 86 LEd 47 (1941)
[5] 46 Miss L. J. 629 (1975).

discretion to defer the resolution of cases otherwise properly before them to the appropriate state forums.

Professor Charles Alan Wright,[6] believes that abstention is a multifarious concept and has attempted to define the "abstention doctrines" by identifying the various situations in which federal courts have declined to proceed with a case even though they have jurisdiction under the Constitution and the statutes.

Those situations are:

> ". . . . (1) to avoid decision of a federal constitutional question where the case may be disposed of on questions of state law;
> (2) to avoid needless conflict with the administration by a state of its own affairs;
> (3) to leave to the states the resolution of unsettled questions of state law; and (4) to ease the congestion of the federal court docket."

Though there are some scholars who would dispense with federal abstention altogether, Currie, *The Federal Courts and the American Law Institute,*[7] the doctrine is with us, has been for some time, and its use is increasing. Other scholars believe that federal abstention should only be invoked or required when an action has been previously initiated in a state court and all the rights of the parties can be resolved in that forum, Kurland, *Toward a Cooperative Judicial Federalism: The Federal Court Abstention Doctrine.*[8] Still another view is that abstention is justified whenever it serves the purposes of federalism, but that invoking abstention to ease the congestion of the federal doctrine goes beyond any-

[6] C. Wright, *Law of Federal Courts 196* (2nd ed 1970).
[7] 36 U. Chi L. Rev. 268, 317 (1969).
[8] 24 F.R.D. 481, 491 (1960).

thing that has been sanctioned by the Supreme Court, and beyond anything required by the demands of federalism. Wright, *The Abstention Doctrine Reconsidered*,[9] and C. Wright, supra, note 5, at 205.

All scholars agree that there is a need for greater certainty in the area of the use of abstention. The American Law Institute has proposed a codification for the use of the power, by defining a narrow class of cases under which it could be invoked, but excluding the right to abstain solely to relieve court congestion.

It should be noted that in the case at bar, the reason for abstention was that state law questions regarding titles to real estate predominate, and that they involve title to real property that is of a complex nature. (App. page 31). As far as can be determined, no federal court has exercised abstention merely because the issues are complex, or because state law questions predominate. The reasons given could fit the usual bent of any federal court case. Because the District Judge in question is acutely conscious of congestion in his court, it is probably proper to categorize the abstention in question as an attempt to lighten the case load in his court. Keady, *The Administration of Justice in the Federal Courts: An Introduction.*[10]

Several Supreme Court decisions have pointed to judicial economy as an important factor to be considered in making an abstention decision. Justice Cardoza in *Landis v North*,[11] by way of dicta, said:

[9] 37 Texas L. Rev. 815, 826 (1959).
[10] 46 Miss L. J. 625 (1975).
[11] 299 US 248 (1936).

> "... the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."

In *Brillhart v Excess Insurance Co. of America*,[12] the Court held:

> "Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitious interference with the orderly and comprehensive disposition of a state court litigation should be avoided."

Chief Justice Burger, dissenting, in *Wisconsin v Constantineau*,[13] said:

> "I quite agree that there is no absolute duty to abstain . . . until the state courts have at least been asked to construe their own statute, but for me it is the negation of sound judicial administration—and an unwarranted use of a limited judicial resource—to impose this kind of a case on a three-judge federal district court, and then, by direct appeal, on this Court. . ."

Federal Courts in half the circuits have dealt with

[12] 316 US 491 (1942).
[13] 400 US 433, 443 (1971).

the issue of judicial economy as a reason for abstention, imposing varying requirements therefor.[14]

It may well be concluded that the abstention doctrine is so ingrained in the choice of decisions of federal district courts, that such decisions have become paramount, even over an Act of Congress.

Though the Supreme Court of the United States has addressed the question of abstention for reason of judicial economy only by way of dicta, or in dissenting opinions, *County of Allegheny v Frank Mashuda Co.*,[15] it has never entertained the question of when abstention must give way to higher considerations. May a District Judge dissent in a case, the Jurisdiction of which is exclusively in the District Court?

Thus, on the one hand, the U.S. District Courts, and the jurisdiction conferred upon them, exist by virtue of the wisdom and the Acts of Congress. On the other hand, these creatures of Congress have begun more and more to refrain from exercising all the jurisdiction conferred upon them by Congress.

Obviously, the work load of federal courts has increased enormously in recent years. Keady, *The Administration of Justice in the Federal Courts: An Introduction.*[16]

[14] *Mottolese v Kaufman*, 176 F2d 301 (2nd Cir 1949);
P. Beiersdorf & Co. v McGohey, 187 F2d 14 (2nd Cir 1951);
Unger v Mandell, 471 F2d 1163 (2nd Cir 1972);
City of Chicago v Sullivan, 379 F. Supp 569 (D. Mass 1974);
Amdur v Lizars, 372 F2d 103 (4th Cir 1967);
Thompson v Boyle, 417 F2d 1041 (5th Cir 1969);
PPG Industries Inc. v Continental Oil Co. 478 F2d 674 (5th Cir. 1973);
Aetna State Bank v Altheimer, 430 F2d 750 (7th Cir 1970);
Reiter v Universal Marion Corp., 173 F Supp 13 (D.D.C. 1959).

[15] 360 US 185 (1959).

Yet there is a need for certainty in this conflict. Do Litigants have a choice of forum in cases where state and federal jurisdiction is concurrent? Do Litigants have a choice of forum in a case where Congress has awarded exclusive jurisdiction to the federal courts? Must litigants undergo unconscionable delays, because of this problem? (This case began in July 1972, more than four years ago.) Greater certainty would result in a conservation of legal and judicial energies; energies unnecessarily expended when a case is shuttled back and forth between federal and state forum.[17] The long delays and increased costs which result from such uncertainty can only result in a diminished respect for our judicial systems.[18]

Almost every federal trial judge has been obliged to take important steps to handle his work load. This Court, as the source of administrative power in the federal judiciary, is acutely aware of the increasing pressures the federal judges undergo in handling their crowded dockets. The use of the abstention doctrine is, of course, only one way to mitigate the problem.

As the District Judges do what they believe they must do, often under the direction of the circuit judges, might they not over use abstention to the point where it is constitutionally impermissible? Suppose a district

[16] 46 Miss L. J. 625 (1975).

[17] American Law Institute, *Study of the Division of Jurisdiction Between State & Federal Courts*, 283-84 (1969).

[18] Note, *Consequences of Abstention by a Federal Court*, 73 Harv L. Rev. 1358 (1960); Comment, *Abstention: A Case Against Forum Shuttling*, 22 J. Pub. L. 439 (1973).

judge should decide, in view of an already over crowded case load, that he will abstain from handling all civil cases for a period of a year, or two years, or ten years? Is it constitutionally impermissible for a district court to refuse to function, or to refuse to decide the cases Congress has created it to decide? Would not such refusal amount to a break down in the philosophy of government which emanates from the Constitution? There must be some point beyond which abstention may not be allowed. The district judges themselves have no guide lines, and most certainly would welcome them. Must some plaintiffs be denied a federal forum simply because they happened to choose a court with a congested docket? These questions will eventually have to be answered.

In this case, the Court is called upon to speak to the issue of whether a federal district court may abstain from hearing a case, the exclusive original jurisdiction of which rests in such court. To compound the question may such federal district court abstain in favor of a state court which has no jurisdiction whatsoever to determine the issues.

If the Court shall desire to forego the over all guideline determination for the use of the abstention doctrine, in this factual situation, then so be it. But the Court is urged to, at the very least, determine that a District Judge may not invoke the doctrine in a case where the Congress has given the Court exclusive original jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Appendix

COMPLAINT

Filed 7-21-72

1. Plaintiffs, Alf Key, Roscoe Key, Jr., Peter Andrew Key, Joe Alfonzia Key, Paul Key, Tom Key, Jr., and Louise Key Mason are non-residents of Mississippi and are residents and citizens of the State of Illinois. Plaintiffs, Georgia Key Bolden and Waldo H. Herman are non-residents of Mississippi and are residents and citizens of the State of Michigan. Plaintiff, Nora Key Johnson, is a non-resident of Mississippi and is a resident and citizen of the State of Ohio. Plaintiff, Gilbert Johnson, is a non-resident of Mississippi and is a resident and a citizen of the State of Texas.

2. Defendants, Mrs. Louise P. Wise, Dr. Louis J. Wise, Jr., Louis Wise, Mrs. Amy Wise Permenter, Louis Paul Fischer and Eugenia Fischer, are residents and citizens of the State of Mississippi. The Defendant, Fannie Wise Kortjohn, is a resident and a citizen of the State of New York, and a non-resident of Mississippi. The Defendant, First National Bank of Huntsville, Alabama, is a corporation, and is a resident and citizen of the State of Alabama, and a non-resident of Mississippi. The Defendants, Max J. Heinberg, III, Mrs. Pauline Heinberg Gagliano, Charles E. Heinberg, William W. Heinberg, and Mrs. Eugenia F. Heinberg, are all residents and citizens of the State of Louisiana, and are non-residents of Mississippi. The United States of America is a necessary party to this suit, and the matter in controversy exceeds, exclusive of interest and cost, the sum of $10,000.00.

3. This is an action for a declaratory judgment pursuant to Section 28, USC 2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears. The action also seeks an injunction and an accounting.

4. This suit asks the Court to declare the rights of the parties in and to certain real property lying and being in the County of Humphreys, State of Mississippi, and being more particularly described as follows:

> Lots 1, 2 and 7 of Section 31, Township 15 North, Range 2 West, and Lot 5, Section 32, Township 15 North, Range 2 West, containing 4.51 acres, more or less.

5. The Plaintiffs claim the land in question as heirs and descendants of Alf Key and his wife, Carrie Cook Key, who acquired the ownership, possession and title to said lands around 1900.

6. The said Alf Key, who died in 1924, or his widow, Carrie Cook Key, who died in 1956, or one of their children, Tom Key, remained continuously in possession of said real property until the end of the crop season in 1969, at which time, the Defendants, or their predecessors in title, took possession when the said Tom Key became too ill to care for the place. Tom Key died in May, 1970.

7. The predecessor in title of all the Defendants, was a partnership composed of Louis Wise and Herman Wise, brothers, who did business as Wise Brothers in Yazoo City, Yazoo County, Mississippi. The said partnership, beginning before 1920, and continuing through the year 1969, lent money almost every year to the said

Alf and Carrie Key, then to their son, Tom Key, for the purpose of making their crops, and would take as security therefor a mortgage or deed of trust on the land in question, plus crops and other personal property. Thus in the year 1931, and the several years before and after, the Wise Brothers partnership had a security interest in said lands as mortgagee.

8. The taxes on said lands were not paid for the year 1931, and thereafter, one Louis Fischer, an agent of and employee of Wise Brothers (who was a nephew of the original partner, and a son of one of the partners at that time) bought the property at the Sheriff's delinquent tax sale. On September 20, 1934, he was deeded said property for the sum of $143.48, by deed recorded in Deed Book 11 at Page 460 in the Records of the Chancery Clerk of Humphreys County, Mississippi. On the 19th day of October, 1934, the said Louis Fischer deeded said lands to his employers, the Wise Brothers, said deed being recorded in Deed Book 11 at Page 489 of the Records of the Chancery Court of Humphreys County, Mississippi, and both are adopted by record herein, as if copied verbatim. Plaintiffs allege and charge that the said Louis Fischer bought the lands at said tax sale as agent of, and for and on behalf of, his employers and family, the Wise Brothers. This is the sole and only source of any claim to the title or ownership in and to said lands by Defendants.

9. Plaintiffs charge that the Wise Brothers did in fact collect from Carrie Cook Key or her children, all monies and considerations paid for said land at the tax sale in question, but they never in fact deeded said property back, as they were under a duty to have done.

10. The aforementioned tax sale was void for several

reasons. In the first place, the equalization of taxes for tax year in question by the Humphreys County Board of Supervisors was not accomplished at the July meeting, as required by statute, which thereupon rendered the tax sale void, and the aforementioned deeds of no force and effect. The practice then effected by the Humphreys County Board of Supervisors was condemned in the case of *Gardner vs Price*, 197 Miss. 831, 21 So. 2d 1 (1945). Furthermore, notice of said tax sale was never given or served upon any of the true owners of the property, and the notice published in the local newspaper, as required by law, gave notice only to "Alf Key Estate." After Alf Key died, no estate was ever opened for him, and there never was a legal entity known as the Alf Key Estate.

11. The Wise Brothers partnership never claimed the land in question as its own; never took possession of said land; until the said Tom Key moved off the place late in 1969, as aforesaid. From the time of said tax sale until late 1969, Wise Brothers dealt with Carrie Cook Key and her sons as they did before the tax sale; that is, they lent them money to farm, collected and sold all the crops, then paid over the balance, if any, to them. The Keys lived on, possessed and occupied the premises at all times from before 1920 until late 1969.

12. Presently, the Defendant, Wise Brothers, now claims the land in question, since Tom Key moved off because of a terminal illness which resulted in his death. They have leased the land to others and are collecting rent therefrom, all of which belongs to Plaintiffs.

13. Unknown to Plaintiffs, the Defendants, or their predecessors in title, entered into a Perpetual Easement Agreement with the United States of America, granting to the United States of America an easement to a part

of the property in question, for a consideration of $6,-500.00, which agreement is filed for record in Deed Book 59 at Page 245 of the Land Records in the Chancery Clerk's Office of Humphreys County, Mississippi. Thereafter, the Defendants granted another easement to the United States of America to more of the lands in question, for $300.00, which second easement is filed for record in Deed Book 64 at Page 126 of the Land Records of the Chancery Clerk's Office of said County and State. Both said easements are adopted by reference herein, as if copied verbatim. The Plaintiffs or their predecessors knew nothing about either easement, received no consideration therefor, and were not approached by any representative of the United States Government to sell their interest in and to said lands. Plaintiffs charge that the United States of America knew or should have known that the title in the Wise Brothers was void; and that therefore, it dealt with them at its own risk. The Defendant, United States of America, did not condemn said lands to procure said easement; the said easement instruments indicate they were procured in connection with work on the Yazoo River levee.

14. Beginning in November, 1969, a series of instruments were filed for record, in the Humphreys County Chancery Clerk's office, apparently for the purpose of settling the interests of the remaining partners of Wise Brothers, which Plaintiffs are informed and believed has now ceased doing business. Those instruments are recorded in said records in Deed Book 78 at Page 29; Deed Book 78 at Page 181; Deed Book 78 at Page 207; Deed Book 78 at Page 224; Deed Book 78 at Page 278; Deed Book 78 at Page 389; Deed Book 79 at Page 71; Deed Book 79 at Page 387; Deed Book 83 at Page 118; and Deed Book 84 at Page 512.

15. Plaintiffs maintain that the said tax sale purchase for 1931 taxes due on the land in question was void; that the deed from Fischer to Wise Brothers was also void; but that even if said tax sale was good, the said Wise Brothers held the land in question in trust for the Plaintiffs, and that said land must now be conveyed back to the Plaintiffs, who here and now demand it back. Or, if the deeds were anything, they amounted only as a mortgage or deed of trust on said property to accure the payment of the 1931 taxes. Plaintiffs allege and charge that said 1931 taxes have long since been collected by said Wise Brothers partnership. Both deeds above referred to, the tax deed from the Humphreys County Chancery Clerk to Louis Fischer and the deed from Louis Fischer to Wise Brothers, constitute clouds upon the title of these Plaintiffs as heirs at law of Alf Key and Carrie Cook Key, deceased, and should be cancelled of record.

16. Wherefore, premises considered, Plaintiffs pray:

1. That the above described tax deed to Louis Fischer, and his subsequent deed to Wise Brothers, be declared void and of no force and effect.

2. That the deeds listed in §14 hereinabove be declared void and of no force and effect, and removed as clouds on the title to the lands in question.

3. That either the two easements mentioned in §13 above, by which the United States of America claims an interest in the lands in question be declared void and of no effect, or that the said United States of America be ordered to pay Plaintiffs the sum of $6,800.00, plus interest, or a reasonable sum of money representing the value of the lands described in said easements.

4. That said deeds be removed as clouds on the title of Plaintiffs in and to the above described property.

5. That the Defendants, or their agents, be required to execute a deed of said property to the Plaintiffs.

6. That Plaintiffs have judgment against the Defendants for immediate possession of the above described real property, and damages for the wrongful withholding thereof.

7. That Plaintiffs have judgment against the Defendants for all rents and profits and income from said property since they took possession thereof the latter part of the year 1969.

8. That Plaintiffs have such further relief as the Court may deem just, including costs.

MOTION TO DISMISS

Filed 8-21-72

The defendants, Louis Wise, Dr. Louis J. Wise, Jr., Mrs. Louise P. Wise, Louis Paul Fischer, and Eugenia Fischer, being all of the parties defendant presently served with process, other than the United States of America, respectfully move the court:

To dismiss the action on the ground that the court lacks jurisdiction for the following reasons:

(a) The complaint, in so far as it seeks a declaratory judgment against the United States in regard to the title to real property and auxiliary relief, is insufficient where there is no allegation of consent by the United States to be

sued, and there is no allegation of either an unconstitutional grant of authority or that federal agents exceeded the scope of their authority.

(b) All parties in interest to the "Alf Key" claim are necessary and indispensable parties to the determination of title question and the auxiliary accounting sought in this suit. *Certain of these parties are citizens of the State of Mississippi*, thus totally destroying diversity under Rule 19 as the rule existed prior to July 1, 1966, and requiring dismissal under the tests of feasibility and of equity and good conscience governing subsequent to July 1, 1966.

MOTION TO DISMISS

Filed 9-22-72

Comes now the United States of America, defendant in the above-captioned and numbered cause, by and through H. N. Ray, United States Attorney for the Northern District of Mississippi, and moves the Court to dismiss this action for the following reasons:

(1)

The Court lacks jurisdiction under Section 2410, Title 28, United States Code. Section 2410 provides that the United States may be named a party to an action in a federal district court or state court having jurisdiction over the subject matter when the United States has or claims a *mortgage or other lien interest*. This Section does not include situation where the United States has an easement interest as distinguished from a lien interest. Plaintiff is asking the Court to extend the meaning

of Title 28, U.S.C.A., Section 2410 to include situations where the United States claims a title interest as well as a lien interest.

(2)

The Court lacks jurisdiction under Section 1346(a), Title 18, United States Code. The defendants, or their predecessors in title, entered into Perpetual Easement Agreements with the United States in *1961* and *1963*, and said Perpetual Easement Agreements were recorded in Deed Book 59 at page 245 on September 7, 1961, and in Deed Book 64 at page 126 on November 22, 1963, in the Land Records of the Chancery Clerk's Office of Humphreys County, Mississippi. Said lease agreements are attached hereto as Exhibits "A" and "B" respectively. Plaintiffs had constructive knowledge of these easements on September 7, 1961 and November 22, 1963, the date of recording said easements in the Chancery Clerk's Office of Humphreys County, Mississippi. A six year limitation period applies to claims under the Tucker Act, Section 1346(a), Title 28, U.S.C., in accordance with Section 2401(a), Title 28, U.S.C. Since plaintiff's action against the United States accrued on September 7, 1961 and November 22, 1963, respectively under the Tucker Act, this action is barred by statute of limitations. The running of statute of limitations is not merely a defense of action brought against the United States under the statute governing jurisdiction of civil actions on claims, but deprives the court of subject matter jurisdiction over the action.

Respectfully submitted
H. M. RAY
United States Attorney

SUPPLEMENTAL MOTION TO DISMISS

Filed 10-12-72

The defendants, Louis Wise, Dr. Louis J. Wise, Jr., Mrs. Louise P. Wise, Louis Paul Fischer, and Eugenia Fischer, being all of the parties defendant presently served with process, other than the United States of America, respectfully move the court:

To dismiss the action on the ground that the court lacks jurisdiction for the following reasons:

(a) The complainant, in so far as it seeks a declaratory judgment against the United States in regard to the title to real property and auxiliary relief, is insufficient where there is no allegation of consent by the United States to be sued, and there is no allegation of either an unconstitutional grant of authority or that federal agents exceeded the scope of their authority.

(b) The complaint, in so far as it seeks to recover from the United States the value of certain lands described in easements recorded Deed Book 59 at Page 245 and Deed Book 64 at Page 126 of the records of Humphreys County, Mississippi, is insufficient for lack of jurisdiction in that the six year statute of limitations set out Section 2401 (a) Title 28, U.S.C., applies. The easements were filed for record September 7, 1961, and November 22, 1963, respectively, and the United States entered into the actual physical possession of each such easement, as to the first not later than November 9, 1961,

and as to the second not later than September 10, 1963, and remained in such actual physical possession continuously thereafter. (See authenticated copy of each easement and affidavit of Lucille Latta).

(c) All parties in interest to the "Alf Key" claim are necessary and indispensable parties to the determination of the title question and the auxiliary account sought in this suit. Alf Key died many years ago and prior to December 1, 1941. He was survived by his wife Carrie Cook Key and five children born to the marriage of Alf Key and Carrie Cook Key who were: Roscoe Key, Tom Key, Georgia Key Bolden, Alfreda Key Hermon, and Carrie Key Johnson. Carrie Cook Key died intestate subsequent to December 1, 1941. Of the said five children born to Alf Key and Carrie Cook Key, two yet survive. They are: Georgia Key Bolden, a party plaintiff and Alfreda Key Hermon who does not appear as a plaintiff, is an indispensable party, and was, at the time of the filing of the complaint, an actual bona fide resident and citizen of Humphreys County, Mississippi. Of the three remaining children: (1) Roscoe Key died survived by his wife and seven children. Six of his children are joined as plaintiffs (Alf Key, Roscoe Key, Jr., Peter Andrew Key, Joe Alfonzia Key, Paul Key and Nora Key Johnson); and one of his children, Lynell Key Jackson, and his widow, Augusta Key, do not appear as parties, are indispensable parties, and were, at the time of the filing of the complaint, actual bona fide residents and citizens of Ran-

kin County, Mississippi; (2) Tom Key died intestate. His estate is being administered in Cause No. E-2828 of the Chancery Court of Humphreys County, Mississippi. He was survived by his wife and three children. Two of the children are joined as plaintiffs, (Tom Key, Jr. and Louise Key Mason); and his widow, Liddie Key and her daughter Katherine Key Hall, do not appear as plaintiffs; are indispensable parties; and were, at the time of the filing of the complaint, actual bona fide residents and citizens of Humphreys County, Mississippi; (3) Carrie Key Johnson died intestate survived by her husband, Gilbert Johnson, as her sole heir at law, who is a party of the complainant. (See affidavits of Jeff H. Hardwick and Lucille Latta; authenticated copy of easement executed by Augusta Key and others who are the heirs of Roscoe Key, deceased; and authenticated copy of Petition and Decree in said Cause No. E-2828).

(d) Since the citizens of Mississippi, listed above in sub-paragraph (c), who are: Alfreda Key Harman, Lynell Key Jackson, Augusta Key, Liddie Key, and Katherine Key Hall, are indispensable parties who must be joined and are citizens of Mississippi, diversity is destroyed and the court deprived of jurisdiction. The movants are without knowledge why these indispensable parties are not joined. No conveyances appear of record from any such party to any party appearing as a plaintiff. But movants charge that any such conveyances, if any exist, do not aid plaintiffs to maintain diversity but disclose

such a tactic as brings into play 28 U.S.C.A. §1359, which says that a federal court shall not have jurisdiction where a party "by assignment or otherwise, has been improperly or collusively made or joined to involve the jurisdiction of such court."

Public Law 92-562
92nd Congress, S. 216
October 25, 1972

AN ACT 86 STAT. 1176

To permit suits to adjudicate certain real property quiet title actions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1346 of title 28, United States Code, is amended by adding at the end thereof the following ne wsubsection:

Real property quiet title actions. Adjudication. 62 Stat. 933; 80 Stat. 1148. Jurisdiction. Infra.

"(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States."

SEC. 2. Section 1402 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) Any civil action under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States shall be brought in the district court of the district where the property is located or, if located in different districts, in any of such districts."

SEC. 3. (a) Chapter 161 of title 28, United States Code, is amended by adding after section 2409 of such title the following new section: 62 Stat. 970; 80 Stat. 304.

"§2409a. Real property quiet title actions

"(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666). 68 Stat. 1241; 84 Stat. 449. 80 Stat. 1140. 66 Stat. 560.

"(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

"(c) The complaint shall set forth with particularity the nature of the right, title or interest which the plaintiff claims in the real property, the circumstances under which it was acquired,

and the right, title, or interest claimed by the United States.

"(d) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title. Supra.

"(e) A civil action against the United States under this section shall be tried by the court without a jury.

"(f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States. 86 STAT. 1177 Statute of limitations.

"(g) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession."

(b) The chapter analysis at the beginning of chapter 161 of title 28, United States Code, is amended by inserting after the item relating to section 2409 the following new item:

"2409a. Real property quiet title actions."

Approved October 25, 1972.

LEGISLATIVE HISTORY:
HOUSE REPORT NO. 92-1559 (Comm. on the Judiciary).
SENATE REPORT No. 92-575 (Comm. on Interior and Insular Affairs).
Congressional Record:
Vol. 117 (1971): Dec. 11, considered and passed Senate.
Vol. 118 (1972): Oct. 12, considered and passed House, amended.
Oct. 13, Senate concurred in House amendment.

THE COURT:

OPINION ON MOTIONS FOR DISMISSAL

Filed Nov. 22, 1972

Gentlemen, this is the ruling of the Court. First, as to the motion of the United States to dismiss, it is overruled on the ground that this Court has jurisdiction over suits of this type against the United States, and of course the six-year statute of limitations is no longer applicable. The Court is further of the view that as between these private litigants, although there appears to be requisite diversity, that the state law questions regarding titles to real estate predominate in this case and it is an area in which the Chancery Court of Humphreys County and the Mississippi Supreme Court has expertise and the parties should repair to those courts for a determination of these questions.

Now, that can be done either by the plaintiffs filing suit in chancery court or by the individual defendants filing suit to confirm their title. The door is open either way. Therefore, the Court believes that in the exercise of proper jurisdiction considerations and to have due respect to "our federalism," to use Mr. Justice Black's statement, that this is a proper case for abstention and that the private litigants should repair to the Humphreys County Chancery Court for the resolution of this dispute.

The suit, however, will remain docketed in this case with no parties dismissed at this time, pending the determination of this question in the state courts of Mississippi. When that is done, then the litigants will make known the issues, the Court will then take the law ques-

tion as decided by the state courts and apply it in any further litigation in this Court to determine the rights of the United States, determine the right of the United States against any third party defendants.

I am making this ruling because I do not see any semblance of a federal question in the case at all. It is simply the United States as the holder of the easement. But that does not make it a federal question case. And a of the questions are state law questions and they are not only that but they involve title to real property that is of a complex nature and the types of disputes that the chancery courts of this state are eminently qualified to resolve.

JERRY L. KELLEY
Official Court Reporter
United States District Court

ORDER ON MOTIONS FOR DISMISSAL

Filed 11-28-72

On the hearing of the motion of the United States of America to dismiss the action for lack of jurisdiction, the Court finds that 28 U.S.C. 2410, as amended, and related statutes, confer jurisdiction and this motion should be overruled.

On the hearing of the motions of the individual defendants to dismiss the action for lack of jurisdiction, the Court finds that it has pendent jurisdiction without regard to diversity of citizenship and the requested dismissal should be denied.

The Court further finds, however, that this action, seeking, as it does, the adjudication of conflicting claims

to the ownership of and interest in land, involves no federal questions on its merits but does involve uncertain and complex state land law issues which should be settled by state courts in the particular circumstances of this case and that this Court should abstain from exercising jurisdiction pending the settlement of the state issues in the appropriate state forum and that further proceedings herein should be suspended.

IT IS, THEREFORE, ORDERED AND ADJUDGED:

1. That the motions to dismiss be and the same are hereby overruled.

2. That all proceedings in this cause in this Court be and the same are hereby suspended, pending the further orders of the Court.

3. That if no suit is filed by any party in the appropriate state forum for determination of the state issues within ninety (90) days from the date of this order, a motion to reactivate the proceedings herein may be presented by any interested party.

4. That when any suit filed in the state forum results in a final judgment on the issues involved, this Court will proceed to a final disposition of this action and grant such relief as may then be appropriate.

SO ORDERED on this *28* day of *November*, 1972.

AMENDMENT TO ORIGINAL COMPLAINT

Filed 12-21-72

The defendants having failed to plead responsively to the complaint, as contemplated by Rule 15(a), of the Federal Rules of Civil Procedure, plaintiffs file this their amendment to the original complaint, and say:

I.

This amendment seeks only to add to the original complaint this paragraph, showing the bases of federal jurisdiction relief upon. Such jurisdiction is invoked first on the ground that the defendants, in conjunction with the acts of state officials of the State of Mississippi, have deprived plaintiffs of their property in violation of the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution, 28 U.S.C. 1331; plaintiffs and defendants are residents of different states and the matter in controversy exceeds, exclusive of interests and costs, the amount of $10,000.00, 28 U.S.C. 1332; plaintiffs have been deprived of their Civil Rights by state action, 28 U.S.C. 1343 and 42 U.S.C. 1983-1985; and because the United States has an interest in the lands in question, having unlawfully acquired such interest from the defendants less than 12 years from this date; it is a necessary party, and in such case Congress and the President conferred *exclusive* original jurisdiction upon this Court to hear and determine the issue, 28 U.S.C. 1346(f), 28 U.S.C. 1402(d) (as amended), and 28 U.S.C. 2409 a (which is the amendment effective October 25, 1972).

MOTION TO RECONSIDER ABSTENTION RULING, AND FOR OTHER RELIEF

Filed 12-21-72

Now come plaintiffs and move the Court as follows:

1. Plaintiffs move the Court to reconsider and to change the Order on Motions for Dismissals heretofore entered on the 28th day of November, 1972, wherein this Court suspended all proceedings in this cause so that any party or parties might file suit within ninety days in the appropriate state forum for a determination of some, if not all, the issues in this case. Plaintiffs take the position that 28 U.S.C. 1346 (f) and 28 U.S.C. 1402(d), the statutes recently amended by Public Law 92-562 of the 92nd Congress, S. 216, effective October 25, 1972, entitled "An act to permit suits to adjudicate certain real property quiet title actions", confer exclusive original jurisdiction of this case upon the United States District Courts. Furthermore, aside from said exclusive jurisdiction statutes, there appear no exceptional circumstances in this case to require this Court to abstain, and for other reasons to be cited in the brief attached herewith.

2. Plaintiffs have filed an Assignment and Quit Claim Deed from Nora Key Johnson, a party plaintiff, of her interest in the property and this suit to Alf Key, another party hereto. Plaintiffs have also filed her Affidavit in connection therewith. Therefore, in accordance with Rule 21, Federal Rules of Civil Procedure, the said Nora Key Johnson and plaintiffs do herewith move that the Court enter an order allowing her to withdraw as a party plaintiff hereto.

3. If the Court should not reconsider and withdraw its order abstaining until the issues herein raised have

been decided by a State Court, then the plaintiffs pray this Honorable Court to so amend its said order suspending all proceedings so that even if the issues are presented to a state forum the parties hereto may nevertheless be allowed to rely upon and to avail themselves of all federal court discovery rules and procedures, the same as if this matter were pending for trial in Federal Court.

4. Plaintiffs believe they have a right to amend their original complaint under Rule 15(a) of the Federal Rules of Civil Procedure, because the defendants have failed to plead responsively thereto. But because this Court in its order on motions for dismissal suspended all proceedings pending further orders of the Court, plaintiffs are in doubt as to whether they may file an amendment a copy of which is attached to this Motion. Said amendment includes only a recital of the bases of jurisdiction in this Court on which plaintiffs rely. Therefore, plaintiffs move the Court for an order allowing them to file said amendment to their original complaint.

5. Plaintiffs further are uncertain as to whether the said order on Motions for Dismissal is such a final order from which they may appeal as a matter of right. Therefore, in accordance with 28 U.S.C. 1292(b), plaintiffs respectfully request the Court when acting in its order dealing with this Motion, to set forth therein that in the opinion of the Court the said order of Abstention involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation. Plaintiffs rely upon the matters and cases discussed in their brief attached hereto in support of this portion of the Motion.

AMENDMENT TO MOTION TO RECONSIDER

Filed 2-26-73

Now come plaintiffs and file this their amendment to the motion to reconsider they have heretofore sent to the Court on the 20th day of December, 1972, and say:

1. None of the defendants have replied to said motion, nor has the Court set said motion down for hearing, or acted in any way thereupon. This motion is Supplemental to the original, and is a matter of some urgency.

2. Since the order of the Court abstaining from hearing this cause, the defendants have filed a bill of complaint against the plaintiffs in the Chancery Court of Humphreys County, Mississippi, and process has been made returnable to the March Term of the Humphreys County Chancery Court, which convenes the 19th day of March, 1973. Under the present status of this case the plaintiffs here, defendants in the State Court, are obliged to appear and answer and possibly have this case heard and determined in the March Term of the State Chancery Court.

3. Plaintiffs have moved the Court to reconsider said abstention ruling on several grounds, not the least of which is that in this case the Mississippi State Court no jurisdiction whatsoever to hear and determine this cause. At the time of the abstention ruling of the Court, on the 21st day of November, 1972, the question of jurisdiction of the State Court was neither briefed nor argued before this Honorable Court. Accompanying this motion is a supplemental brief, containing points and authorities, which very sharply focuses upon this issue.

4. As an additional ground for relief in the motion

to reconsider, plaintiffs have requested the Court to act in accordance with 28 U.S.C. 1292(b), so that this very question of jurisdiction as well as the other grounds stated in the motion, may be reviewed on appeal by the Fifth Circuit Court of Appeals. If plaintiffs are correct as to the jurisdiction points raised, and even though this Honorable Court may disagree with that position, the quickest solution to the problem for all parties is to resolve such question in the Federal Courts, before the matter has to make its way through the State Courts, then finally again be called in question in the Federal Courts. One way or another, that is, either now or at the conclusion of the State Court hearing, these questions will have to be resolved by the Federal Courts.

5. Plaintiffs thereupon call upon the Court to hear and determine this matter either before the March term of the State Chancery Court, or if not before then, then enjoin the plaintiffs from proceeding in the State Court until these matters are finally determined by the Federal Courts.

ORDER

Filed 2-27-73

The court having considered plaintiffs' motion to reconsider its abstention ruling made in this cause October 21, 1972, and briefs in support thereof, and after being duly advised, concludes that the motion is not well taken and the suit filed by defendants in the Chancery Court of Humphreys County, Mississippi, should be allowed to proceed, but without prejudice to the ultimate determination as to the rights or interests claimed by the United States in the real property involved in said litigation.

It is further ordered that upon the final outcome of the litigation instituted by defendants in the Chancery Court of Humphreys County, counsel for plaintiff and defendants notify this court of the issues then remaining in the cause.

This, 27th day of February, 1973.

FIFTH CIRCUIT ORDER

Filed Jun 12 '73

No. 73-1962

ALF KEY, ET AL., *Plaintiffs-Appellants,*

versus

MRS. LOUISE P. WISE, ET AL., *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Mississippi

Before WISDOM and AINSWORTH, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' motion to dismiss the appeal, filed in the above styled and numbered cause, is hereby GRANTED.

IT IS FURTHER ORDERED that appellants' motion for stay of the State Court proceedings pending appeal, is hereby DENIED.

MISSISSIPPI CHANCERY COURT FINDINGS

Filed 10 September 1974

Suit was begun in Chancery Court of Humphreys County, Mississippi, by Louis Wise and others therein named, against Tom Key and others therein named, seeking to cancel as clouds on the title of complainants' five deeds set out in the pleadings and to adjudicate complainants to be the true owners of the lands embraced in the deeds.

The land was described by conventional governmental survey; title was shown out of the government and, by accepted muniments of title, into complainants; their respective interests were shown; adverse possession in complainants was set up, as was complainants' position as a mortgagee who entered after condition broken and who are still in possession; specific statutes of limitation were set up; the invalidity of defendants' title was set up. All by complainants' pleadings.

The pleadings of defendants reveal some several dilatory pleas which were passed on by the Court adverse to defendants and finally, the answer of defendants setting up the same pleas as affirmative defenses and likewise being a general denial of complainants' original bill.

The matter came on for hearing, which hearing was extensive, both as to time, witnesses, exhibits, and arguments of counsel.

No request under the applicable statutes or the Rules of Chancery Practice was made to the Court for either a ruling on reserved rulings made during the trial or for a finding of fact.

The Court took the matter under advisement for the rendition of a decree in vacation, after first announcing in open Court that the Court was of the opinion and was so holding that the complainants were entitled to the relief prayed for in their original bill and that a written finding of fact would thereafter be filed.

Counsel for the complainants presented a decree at that time in open Court. Whereupon counsel for the defendants requested that no decree be then entered, stating that he wished the finding of fact incorporated therein, the Court acceding thereto.

This finding thus far recites the above so as to state the real issues and place this litigation in its proper sequence.

Evidentiary, I find as a fact that the parties complainant and parties defendant, and the alleged varying interests of said complainants are as set out in the original bill, same being admitted by the answer. I further find that the correct description of the land involved is as follows:

> Lots 1, 2, and 7, Section 31, and Lot 5, Section 32, Township 15 North, Range 2 West, Humphreys County, Mississippi, less and except certain exceptions;

in that, while defendants deny the description of the land in the original bill, they thereupon allege the true description of the lands involved to be the same as shown by said bill so far as lot, section ,township, range, County and State.

I find as a fact that the parties complainant, through and by their predecessors in title, entered said lands in

controversy with good and sufficient color of title and have there remained from the year 1932, thence hitherto, which occupancy has been and is hostile, actual, open, notorious, and exclusive to all others.

I find as a fact that none of the several other defenses raised by the answer; outright fraud, concealed fraud, fiduciary relationship, including but not limited to the charging of "excessive, illegal and usurious interest;" can prevail to toll the statute. This Court here makes this above disposition of these issues in the heighth of charity.

The Court is constrained to state that defendants are either unaware of certain time-honored rules as announced by our Supreme Court regarding the charging and proof of fraud, concealed or otherwise, or they have chosen to ignore the same. Fraud is not to be presumed nor is it to be lightly charged. It must be specifically charged. The bill must be sworn to. The proof must go beyond mere preponderance and rise to the dignity of clear, cogent and concise. Here, same was charged upon information and belief in loose and general languags in an unsworn answer. At the trial, not a scintilla of evidence was offered in proof thereof by defendants.

I find as a fact that the last issue involved herein as going to the merits, to-wit, the effect of the mortgage of February 5, 1931, given by only Carrie Cook Key, Roscoe Key, and Thomas Key, must be resolved against the defendants for the reason that the entry above found and the possession thereafter likewise found above, constitutes a sufficient ouster of Georgia Key Bolden, Alfred Key Herman and Carrie Key Johnson, and their successors, notwithstanding the erroneous conclusion of law pled by defendants concerning the effect of said

deed of trust and the quantum of interest therein conveyed.

In short, I find as a fact that complainants have prevailed by that necessary degree of the credible evidence in the establishment of the allegations of their original bill.

The Court, therefore, enters as its conclusions of law, its own Order appended hereto, with directions to the Clerk hereof to append thereto this finding, same being compatible with the earlier announced decision of the Court and this finding.

This June 18, 1974.

ERNEST KELLNER
Chancellor

Not typed and prepared for delivery on June 18, 1974. Thereafter revised to honor request of defendant to incorporate with decree. Thereafter revised as to grammar, spelling, etc., and finalized. Handed Reporter this September 10, 1974.

ERNEST KELLNER
Chancellor

MISSISSIPPI CHANCERY COURT FINAL DECREE

Filed 10 September 1974

This cause coming on to be heard on the Bill of Complaint of Louise Wise, Amy Wise Permenter, Fannie Wise Kortjohn, Virginia C. Wise, Louise P. Wise, Dr. Louis J. Wise, Louis Paul Fischer, Eugenia Fischer, Max J. Heinberg, III, Mrs. Pauline Heinberg Gagliano, Charles E. Heinberg, William W. Heinberg, and Mrs. Eugenia F. Heinberg; on answer of Tom Key, Jr.,

Louise Key Mason, Alf Key, Roscoe Key, Jr., Peter Andrew Key, Joe Alfonzia Key, Paul Key, Gilbert Johnson, also known as Gilbert Johnson, Jr., Waldo H. Herman and Georgia Key Bolden; on pleading styled: "Disclaimer of Certain Separate Defendants" filed by Katherine Key Hall, Liddie Key, also known as Liddie Moore Key, Nora Key Johnson, Lynell Key Jackson, Augusta Key, also known as Augusta Strong Key, and Alfred Key Herman; on all other papers in the cause, including order for trial in vacation, filed June 5, 1973, order taking the cause under advisement for decision filed June 25, 1973, and order dated and filed June 13, 1974; and on oral and documentary evidence; and having heard all the same, together with the arguments and written briefs of counsel, and being now fully advised in the premises, the Court is of the opinion and so finds, that the complainants are entitled to the relief prayed for in their "Original Bill of Complaint to Cancel Clouds on Title"; it is, therefore,

ORDERED, ADJUDGED, AND DECREED that the following described lands located in Humphreys County, Mississippi, being the lands sued for herein, to-wit:

> Lots 1, 2, and 7 of Section 31; and Lot 5 of Section 32; all in Township 15 North, Range 2 West, containing 451 acres, more or less; subject to: (1) perpetual easements for benefit of the United States, recorded in Book 59 at Page 245 and Book 64 at Page 126 of the deed records, said county; (2) oil, gas and mineral lease evidenced by instrument recorded Book 78 at page 181, said records; and (3) rights of way for public roads and utilities heretofore placed upon said lands.

are, and the same are hereby declared to be the property of the complainants as their interests appear in the pleadings, to-wit: Louis Wise, Amy Wise Permenter, Fannie Wise Kortjohn, and Virginia C. Wise, as to an undivided three-fortieths (3/40th) interest each; Max J. Heinberg, III, Pauline H. Gagliano, Charles E. Heinberg, William W. Heinberg, and Mrs. Eugenia F. Heinberg as to an undivided one-twenty-fifth (1/25th) interest each; Louis Paul Fischer and Eugenia Fischer, as to an undivided one-tenth (1/10th) interest each; Dr. Louis J. Wise as to an undivided three-tenths (3/10ths) interest, but subject to a life estate for the benefit of Louise P. Wise in and to an undivided one-tenth (1/10th) of the oil, gas and other minerals appertaining to the Dr. Louis J. Wise interest, remainder on the death of the life tenant to Dr. Louis J. Wise; and that the defendants Tom Key, Jr., Louise Key Mason, Alf Key, Roscoe Key, Jr., Peter Andrew Key, Joe Alfonzia Key, Paul Key, Gilbert Johnson, also known as Gilbert Johnson, Jr., Waldo H. Herman, Georgia Key Bolden, Katherine Key Hall, Liddie Key, also known as Liddie Moore Key, Nora Key Johnson, Lynell Key Jackson, Augusta Key, also known as Augusta Strong Key, and Alfred Key Herman, and each of them, have no right, title or interest in said lands or any part thereof; and that every such claim heretofore asserted by said defendants, or any one of them, to said lands or any part thereof, be held for naught and is hereby wholly cancelled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED the following deeds be and they hereby are cancelled as clouds on the title of these complainants, which deeds are:

(a) Deed of Alfred Key Herman to Waldo H. Her-

man, dated September 3, 1970, filed for record October 16, 1972, and recorded Book 86 at Page 219 of the Deed Records of Humphreys County, Mississippi.

(b) Deed of Katherine Key Hall to Louise Key Mason dated September 7, 1970, filed for record October 16, 1972, and recorded in Book 86 at Page 221 of the records, said county.

(c) Deed of Augusta Strong Key and Lynell Key Jackson to Alf Key, dated December 16, 1970, filed for record October 16, 1972, and recorded Book 86 at Page 223 of the Deed Records, said county.

(d) Deed of Nora Key Johnson to Alf Key, dated November 27, 1972, filed for record December 4, 1972, and recorded in Book 86 at Page 498 of the Deed Records, said county.

The Clerk of this Court is directed to enter upon the margin of the Deed Records of Humphreys County, Mississippi, at the respective places of recordation of said deeds, the cancellation of each by reference to this decree.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the costs of this proceedings are taxed against the defendants, for which let execution issue.

ORDERED, ADJUDGED, AND DECREED, this the 13th day of June, 1974.

ERNEST KELLNER
Chancellor

PETITION FOR A WRIT OF MANDAMUS

Filed May 21, 1976

The petition of Alf Key et al, hereinafter referred to as plaintiffs, respectfully shows that:

1. The complaint (app. 1-8) was filed in the cause on the 21st day of July 1972 against Mrs. Louise P. Wise and twelve other individual defendants as descendants of two members of a partnership, and against the United States of America. The suit seeks to recover possession of, and quiet title to, approximately 451 acres of land in Humphreys County, Mississippi, and within the jurisdiction of the Greenville Division of the United States District Court for the Northern District of Mississippi. Jurisdiction was based upon diversity of citizenship.

2. The defendants, by motions to dismiss, (App. 8-14) challenged the fact of the diversity between the parties.

3. Prior to a hearing upon said motions to dismiss, Public Law 92-562 (App. 15-16) of the 92nd Congress, S. 216, 86 Stat. 1176, became the law of the land, effective date the 25th day of October 1972. By that Law, the district courts were given exclusive original jurisdiction of civil actions to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

4. In this case, the United States claims a substantial interest in the 451 acres of land in question, by virtue of two perpetual easement deeds from the Wise defendants, to the U.S.A., for the purpose of building a levee.

The land in question is situate upon the banks of the Yazoo River, and at such point, said river is a navigable stream. A levee has been built upon the land in question, by the United States Corps of Engineers.

5. On the 28th day of November 1972, after due notice to all parties and all parties being there represented, District Judge William C. Keady held a hearing in Greenville upon the motions to dismiss. During the hearing, the assistant United States Attorney called Washington, D.C., by telephone, and then and there had Public Law 92-562 read to the Judge and all parties, said statute apparently then being new to all concerned. After hearing the statute read over the telephone, and hearing the arguments of the party litigants, Judge Keady decided that the motions to dismiss should be overruled, that the Court did have jurisdiction, but that the Court should abstain from hearing the case until either the Keys or the Wises should file suit in state court and obtain a state court decision as to the issues. (App. 17). Thereupon, the Court entered its order upon said ruling (App. 19).

6. Thereafter, plaintiffs obtained a copy of Public Law 92-562, and on the 21st day of December 1972, filed their amendment to the original complaint (App. 20), resting jurisdiction upon several other grounds, including the fact that said Public Law 92-562 conferred exclusive original jurisdiction upon the district court below.

7. On the 21st day of December 1972, plaintiffs filed their motion to reconsider the abstention ruling, and for other relief, based primarily upon Public Law 92-562. Among the other relief sought was that even if

plaintiffs must try their case in state court, that the parties be allowed to rely upon and to avail themselves of all federal court discovery rules and procedures (App. 21).

8. By an amendment to the motion to reconsider (App. 24), filed the 26 day of February 1976, plaintiffs showed that the Wise defendants had initiated a state court action, and prayed that said action be enjoined.

9. Then by its order dated 27 February 1973, without a hearing thereon, Judge Keady overruled plaintiffs' motion to reconsider, and concluded that the state court action should be allowed to proceed, *but without prejudice to the ultimate determination as to the rights or interests claimed by the United States in the real property involved in said litigation.* (App. 25).

10. Plaintiffs thereupon appealed the decision of Judge Keady to the Fifth Circuit Court of Appeals. On the 12th day of June 1973, Judges Wisdom and Ainsworth sustained a motion to dismiss the appeal, and denied plaintiffs' motion to stay the state court proceedings. (App. 27).

11. The state court trial, in the Humphreys County Chancery Court, began on the 19th day of June 1973, and lasted four days. Obviously, the Wises gave the Keys practically no time to prepare for trial. One extremely important disadvantage to the Keys (plaintiffs here) was that the Mississippi Chancellor refused to allow them to discover the all important books and records of the Wise Brothers! The District Judge had also refused a request for discovery rights. (App. 22-23).

12. After the trial in June 1973, the State Chancellor took the matter under advisement and kept it in the

bosom, as far as plaintiffs are concerned, until June 13, 1974, at which time he entered an order that complainants (the Wises) were entitled to the relief prayed for, but continuing the case under advisement for entry of the court's opinion and final decree.

13. Thereafter, on 10 September 1974, the state court finally filed its findings (App. 28) and final decree (App. 32), some 15 months after the trial began.

14. Within the time allowed by law, the Keys perfected their appeal from the decision of the state court, which they verily believe is clearly erroneous in a number of important respects. A most obvious error, was that the state court refused to apply the 12 year statute of limitations, as provided by Public Law 92-562, but used instead the state court 10 year statute. It appears that the only claim the Wises have to the property is upon an adverse possession claim to themselves. The facts show that the claim of the United States rests upon a deed filed more than 10, but less than 12 years before this suit was filed; that one of the Key tenants in common lived upon the land, in exclusive possession thereof, until he died in 1970, and it was not until after his death that the Wises ever got their first possession of the property.

15. The outcome of the state court proceedings presently rests in the bosom of the Mississippi Supreme Court. As yet, the case has not been set for argument, though argument has been requested. The end is not in sight.

16. Many issues needed to be raised in the Mississippi Supreme Court including the question whether Mississippi State Courts have any jurisdiction to try the case.

However, that Court limited the Keys to 50 pages in their written brief. Some important points had to be left unargued.

17. In the light of the order of Judge Keady dated 27 February 1973 (App. 25), in effect ordering the Mississippi State Court not to prejudice the rights of the United States (which was not a party to the State Court action), it would have been rather awkward for the Mississippi Chancellor to decide the case in favor of the plaintiffs (Keys), from whom the United States has no deed to the property in question.

18. These plaintiffs (Keys) believe so strongly that the state court should not have been allowed to try the issues in this cause, and that the state court lacked jurisdiction to try all the issues, that they did not attempt to further confuse the jurisdiction problem by filing a cross-action against the Wises.

19. The state court action could not, nor did it attempt to, try all the issues. It omitted many necessary parties, including the United States. The Keys believed that they were prevented from filing a cross complaint, which would have had to make the United States a party.

20. The basis of this mandamus action may be summarized as follows:

(a) There was no motion made for the stay action by Judge Keady; it was ordered by the Court, without first allowing any party to argue for or against it.

(b) There was at the time of the stay order no action pending in any other court between the parties regarding the issues.

(c) This is primarily a suit in rem, and the rule

adopted by the United States Supreme Court that the first court which assumes jurisdiction acquires exclusive jurisdiction, was not followed.

(d) The stay was not effected to avoid a federal constitutional question, when it might be disposed of on questions of state law.

(e) The stay was not effected to avoid needless conflict with the administration by a state of its own affairs.

(f) There are no unsettled questions of state law applicable to this case. Most of the issues revolve around whether the Wises ever acquired the property by adverse possession—issues which have been spoken to many many times by the Mississippi Supreme Court.

(g) There exists no exceptional circumstances warranting a stay, such as some recognized public policy or defined principle.

(h) At the time of the stay, and the state court trial, there existed in the Mississippi State Courts no broad discovery proceedings, as was available in the federal courts.

(i) Under Mississippi law, the law used in the state court trial of these issues, the statute of limitations is ten years; the limitations under Public Law 92-562 which should have been controlling in this case, is twelve years.

(j) And finally and more importantly than all the other reasons here advanced, Public Law 92-562 confers *exclusive* original jurisdiction to try the issues in this case upon the United States District Court for the Northern District of Mississippi, Greenville Division.

(k) Plaintiffs do not here attempt to argue the case for the United States, but a point ought to be made, especially in view of the fact that the U. S. Attorney has refused to confer with plaintiffs in this regard. Suppose the state court should decide the issues in favor of plaintiffs, in which case the United States would own no interest in the lands in question. In view of Public Law 92-562, would such a decision by the state court be binding upon the government? Are they not entitled to be heard upon all the possession and ownership issues by the U, S. District Court?

21. To the expected suggestion to the Court that this matter might well have been brought before the Court sooner, plaintiffs admit the truth thereof. But the case is still undecided; the issue of jurisdiction has to be met and resolved at some point. Even after a decision by the Mississippi Supreme Court, the matter still has to be decided by the U. S. District Court, and after that, the jurisdiction question presented to the Fifth Circuit Court on Appeal. The issue was presented to this Court on appeal, from the stay order of Judge Keady but the appeal was dismissed, without a decision thereon.

22. And the appeal was not res adjudicata to the issues. In *Mottoleso v. Preston*, 172 F2d 308, a Second Circuit case, the plaintiffs there challenged a stay order entered by Judge Kaufman. That appeal was dismissed by the Second Circuit, but the Court did suggest that mandamus was the proper way to present the issue to the appellate Court. Thereafter, in *Mottolese v. Kaufman*, 176 F 2d 301 (2nd Cir 1949) in a key opinion by Judge Learned Hand, the jurisdictional question as to the stay order, was presented by mandamus, and decided.

23. These plaintiffs have been much aggrieved by the stay order of Judge Keady, have been caused to go to much extra expense, have been delayed in having their issues presented fairly to the Court for a determination thereof, and have been wrongly prevented from enjoying the fruits of their lands.

WHEREFORE, petitioners pray:

(1) That an order be issued, directed to the said Honorable William C. Keady, Judge of the United States District Court for the Northern District of Mississippi, requiring him to show cause in this Court, at a time to be designated, why he should not execute the mandate of this Court, and vacate so much of the order on motions for dismissal (App. 19) which stays or suspends this federal court suit and allows the Wises to file suit in state court for a determination of the issues; and to vacate so much of the second order (App. 25) which overruled plaintiffs' motion to reconsider and to enjoin the Wises from proceeding with the state court action.

(2) That a writ of mandamus issue from this Court directing the Honorable William C. Keady to execute the mandate of this Court, to vacate so much of the said order on motions for dismissal (App. 19) which stays or suspends this federal suit in state court for a determination of the issues; and to vacate so much of the second order below (App. 25) which overruled plaintiffs' motion to reconsider and to enjoin the Wises from proceeding with the state court action; and to enjoin the Wises from proceeding further with the said state court action.

(3) In the alternative, these plaintiffs or petitioners pray that this Court enjoin the Wise defendants or respondents forthwith from proceeding with the state court

action, lest petitioners be caused to undergo more expense to argue the matter orally before the Mississippi Supreme Court when a date is set for such arguments.

(4) That plaintiffs have such additional relief or process as may be necessary and appropriate in the premises.

Respectfully submitted,

C. M. MURPHY
Attorney for Petitioners
308 Dermon Building
Memphis, Tennessee 38103

FIFTH CIRCUIT ORDER

Filed May 24, '76

No. 76-2394

In Re:

ALF KEY, ROSCOE KEY, JR., PETER ANDREW KEY, JOE ALFONZIA KEY, PAUL KEY, TOM KEY, JR., LOUISE KEY MASON, GEORGIA KEY BOLDEN, WALDO H. HERMAN AND GILBERT JOHNSON,

Petitioners.

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Mississippi

Before GODBOLD, DYER and RONEY,
Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is denied.

FIFTH CIRCUIT ORDER

Filed June 28 1976

No. 76-2394

IN RE:

ALF KEY, ROSCOE KEY, JR., PETER ANDREW KEY, JOE ALFONZIA KEY, PAUL KEY, TOM KEY, JR., LOUISE KEY MASON, GEORGIA KEY BOLDEN, WALDO H. HERMAN and GILBERT JOHNSON,

Petitioners.

Appeal from the United States District Court for the Northern District of Mississippi

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before GODBOLD, DYER and RONEY,
Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for Rehearing En Banc is DENIED.

CERIFICATE OF SERVICE

I, C. M. Murphy, attorney for petitioners in the foregoing action, hereby certify that on the 27th day of September 1976, I served the attached Petition for Certiorari upon the defendants by depositing three copies thereof in the United States mails, postpaid, addressed to each of the following: Judge William C. Keady, United States District Court, Post Office Drawer 190, Greenville, Mississippi 38701; The Solicitor General, Department of Justice, Washington, D. C. 20530; and Honorable Vardaman S. Dunn, 1741 Deposit Guaranty Bank Building, Jackson, Mississippi 39205.

C. M. Murphy

C. M. Murphy
Attorney for Petitioners
308 Dermon Building
Memphis, Tennessee 38103

Supreme Court, U. S.
FILED
OCT 26 197
MICHAEL RODAK, JR. CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-452

ALF KEY, ET AL.,
Petitioners,

vs.

WILLIAM C. KEADY, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF MISSISSIPPI, ET AL.,
Respondents.

BRIEF FOR THE RESPONDENTS AND OBJECTION TO JURISDICTION AND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

VARDAMAN S. DUNN
Post Office Box 1046
Jackson, Mississippi 39205
Attorney of Record for Respondents

R. L. MERDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-2030

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-452

ALF KEY, ROSCOE KEY, JR., PETER ANDREW KEY, JOE ALFONZIA KEY, PAUL KEY, TOM KEY, JR., LOUIS KEY MASON, GEORGIA KEY BOLDEN, WALDO H. HERMAN AND GILBERT JOHNSON,

Petitioners,

vs.

WILLIAM C. KEADY, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF MISSISSIPPI, AND LOUIS WISE, AMY WISE PERMENTER, FANNIE WISE KORTJOHN, VIRGINIA C. WISE, LOUISE P. WISE, DR. LOUIS J. WISE, LOUIS PAUL FISCHER, EUGENIA FISCHER, MAX J. HEINBERG, III, MRS. PAULINE HEINBERG GAGLIANO, CHARLES E. HEINBERG, WILLIAM W. HEINBERG, MRS. EUGENIA F. HEINBERG, THE UNITED STATES OF AMERICA,

Respondents.

RESPONDENTS'* OBJECTIONS TO JURISDICTION AND BRIEF IN OPPOSITION

Respondents deny the petitioners' claim that the Court has jurisdiction.

*Respondents represented are: Louis Wise, Amy Wise Permenter, Fannie Wise Kortjohn, Virginia C. Wise, Louis P. Wise, Dr. Louis J. Wise, Louis Paul Fischer, Eugenia Fischer, Max J. Heinberg, III, Mrs. Pauline Heinberg Gagliano, Charles E. Heinberg, William W. Heinberg and Mrs. Eugenia F. Heinberg.

Respondents will demonstrate that the Petition for a Writ of Certiorari was not timely filed and that there is no jurisdiction to consider the Petition.

The Petition seeks review of an Order of the Fifth Circuit filed May 24, 1976, denying a Petition for a Writ of Mandamus (Apx. 56). A Petition for Rehearing was denied by an Order filed June 28, 1976 (Apx. 57).

The present Petition was filed with the Clerk of this Court on September 28, 1976 (see notice on official form appended to this brief).

Excluding the day that the last Order was filed (June 28, 1976), the 90th day fell on September 26, 1976, which was Sunday. The following day, September 27, 1976, then became the final filing day, but the Petition was not filed until September 28, 1976, one day late or 92 calendar days after entry of the Order involved.

PRELIMINARY STATEMENT

The Petition seeks review of a decision of the Fifth Circuit Court of Appeals denying an application to that Court for a Writ of Mandamus to District Judge William C. Keady.

The mandamus relief prayed for would have directed the District Court to act in a certain way on certain motions and to vacate orders declining to act in the manner desired by petitioners, and would have directed also the issuance of a federal stay order against the trial of certain land title issues in the state court.

The refusal of the District Judge to stay proceedings in the state court was the subject of an order entered

February 27, 1973 (Apx. 38), from which an appeal was taken to the Fifth Circuit, which appeal was dismissed on June 12, 1973. At the same time, the Court of Appeals denied appellants' motion to stay the state court proceedings (Apx. 39). No effort was then made to have this decision reviewed by the Supreme Court of the United States.

Failing the first time, petitioners waited until May 21, 1976, and then filed in the Court of Appeals a "Petition for a Writ of Mandamus" (Apx. 47), which, in essence, sought the same relief that the Court of Appeals was asked, but refused, to grant on the appeal in 1973, including a stay of state court proceedings.

The state court proceedings in question had commenced in the Chancery Court of Humphreys County on June 19, 1973, and had been concluded there four days later, resulting in a decree against the defendants (petitioners here), from which an appeal was taken. This appeal is now pending before the Supreme Court of Mississippi.[1]

The Fifth Circuit denied the Petition for the Writ of Mandamus by Order filed May 24, 1976 (Apx. 56). A Petition for Rehearing was denied by Order filed June 28, 1976. The present Petition was filed September 28, 1976, or 92 days later.

---

1. This appeal is Cause No. 48,965 in the Supreme Court of Mississippi. The case is set for oral argument and final submission to that Court on November 9, 1976.

REASONS FOR DENYING THE WRIT

A.

There Is No Jurisdiction Because the Petition Was Not Timely Filed

Rule 22 states in part:

"3. A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the clerk within the time prescribed by law."

This case falls within the "all other cases" category where the time is prescribed by law.

28 U.S.C. §2101 provides in pertinent part as follows:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. . . ."

An appeal is taken or a writ is applied for when the required notice or petition is filed with the Court or Clerk. *Credit Company* v. *Arkansas Central Railway Co.*, 128 U.S. 258, 9 S.Ct. 107 (1888); *Farrar* v. *Churchill*, 135 U.S. 609, 10 S.Ct. 771 (1890).

In *United States* v. *Angeline Lombardo*, 241 U.S. 73, 36 S.Ct. 508 (1915), the Court said:

". . . Filing, it must be observed, is not complete until the document is delivered and received. 'Shall file' means to deliver to the office, and not send through the United States mails. Gates v. State, 128 N.Y. 221, 28 N.E. 373. A paper is filed when it is delivered to the proper official and by him received and filed. . . ."

Since the time for filing a petition for the writ is prescribed by an Act of Congress and not by a rule of Court alone, the time limitation is jurisdictional, as to which see: *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 73 S.Ct. 245 (1952); *Matton Steamboat Co.* v. *Murphy*, 319 U.S. 412, 63 S.Ct. 1126 (1943); *Rust Land & Lumber Co.* v. *Jackson*, 250 U.S. 71, 39 S.Ct. 424 (1919); *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 43 S.Ct. 458 (1923).

It may be that the Petition was "mailed" on the last day allowed for filing, but it was not received and filed until the day following. Depositing a document in the United States mail, however, is not a filing with the Clerk as the law requires. It was so held in *United States* v. *Angeline Lombardo*, 241 U.S. 73, 36 S.Ct. 508 (1915), quoted supra. See also *Poynor* v. *Commissioner of Internal Revenue*, 81 F.2d 521 (CA 5, 1936); *Lejeune* v. *Midwestern Ins. Co.*, 197 F.2d 149 (CA 5, 1952).

The time count is governed by *Rule 34*, which provides in pertinent part:

"1. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. A half holiday shall be considered as other days and not as a holiday."

So, computing the time, the filing of the Petition was not accomplished until the 92nd day, excluding the date of entry of the Order (June 28, 1976), and excluding Sunday, September 26, 1976. This was one day too late.

We, therefore, submit that the untimely Petition should be dismissed on jurisdictional grounds.

B.

The Writ of Mandamus Was Properly Denied

Petitioners have asserted that the District Court in this local land title case should claim exclusive jurisdiction and should not stay its hand pending resolution of issues of local land law in an ongoing and practically finished state court litigation involving only private litigants but, instead, should enjoin the litigation in the state forum.

A motion seeking to persuade the District Court to this position was made (Apx. 35-38) and overruled by Order filed February 27, 1973. Petitioners appealed and presented to the Court of Appeals a motion to stay the state court proceedings. The appeal was dismissed on motion of appellees and the motion for stay was denied by order of the Court of Appeals on June 12, 1973 (Apx. 39). No effort was made to obtain a review of that decision here.

Since then, the state proceedings continued through a trial in the Chancery Court of Humphreys County, the entry of a Decree and the perfection of and processing of an appeal to the Supreme Court of Mississippi, which remains pending but is soon to be resolved.

Becoming impatient, petitioners on May 21, 1976, almost three years after their unsuccessful appeal to the

Fifth Circuit, filed a "Petition for a Writ of Mandamus" raising again the same questions.

The only question of substance raised by the mandamus petition filed in the Fifth Circuit involves the contention that the federal court has *exclusive* jurisdiction and that the state court proceedings are therefore without meaning or effect.

This position is vigorously disputed and is the subject of debate in the state Supreme Court and doubtless will be the subject of debate in the United States District Court which has retained jurisdiction in the case filed there by petitioners.

We do not address the merits of the jurisdictional question here, because the resolution to be made of the issue by either the Supreme Court of Mississippi or the United States District Court or both will be subject to appeal and review processes by any aggrieved party.

Therefore, the drastic writ of mandamus is inappropriate in the circumstances of this case and the discretion to deny the writ was properly exercised by the Court of Appeals by its Orders of May 24 and June 28, 1976 (Apx. 56-57).

Authority for respondents' position is found in *Ex Parte Fahey*, 332 U.S. 258, 67 S.Ct. 1558. At best, the petitioners seek mandamus as a substitute for appeal, claiming inconvenience and extra expense, but the rule does not recognize this as a valid reason for issuance of the extraordinary writ. As held in *Schlagenhauf* v. *Holder*, 379 U.S. 104, 85 S.Ct. 234:

> "It is, of course, well settled, that the writ is not to be used as a substitute for appeal, Ex parte

Fahey, 332 U.S. 258, 259-260, 67 S.Ct. 1558, 1559, 91 L.Ed. 2041, even though hardship may result from delay and perhaps unnecessary trial, Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382-383, 74 S.Ct. 145, 147-148, 98 L.Ed. 106; United States Alkali Export Ass'n v. United States, 325 U.S. 196, 202-203, 65 S.Ct. 1120, 1124, 89 L.Ed. 1554; Roche v. Evaporated Milk Ass'n, supra, 319 U.S. at 31, 63 S.Ct., at 944. . . ."

Accord: *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 74 S.Ct. 145 (1953).

As to petitioners' effort to have the federal court enjoin proceedings in the state court, this will not do,—even if it were conceded, for the sake of the argument, that the exclusive jurisdiction of the controversy has been given to the federal District Court, and that the state court has no jurisdiction at all. The Court is firmly committed to the view that the Act of Congress known as the anti-injunction statute (28 U.S.C. §2283) admits of no such exception to its sweeping prohibition against enjoining proceedings in state courts. It was so held in *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 90 S.Ct. 1739 (1970), and in *Amalgamated Clothing Workers of America* v. *Richman Brothers*, 348 U.S. 452, 75 S.Ct. 452 (1955). See also *T. Smith & Son* v. *Williams*, 275 F.2d 397 (CA 5, 1960); 1A *Moore's Federal Practice*, §0.208[4].

There is no act of Congress authorizing an injunction to stay state court proceedings. There is no federal judgment to protect or effectuate. The District Court has retained its own jurisdiction and that jurisdiction is unchallenged as far as it goes and needs no aid.

CONCLUSION

The Petition should be dismissed for want of jurisdiction to entertain the untimely Petition. If mistaken, the Petition should be denied for the other reasons assigned.

The Court of Appeals exercised its discretion in denying the writ. In seeking reversal, petitioners have the burden of showing that a right to the writ existed that is "'clear and indisputable'", *Bankers Life & Casualty Co.* v. *Holland*, supra. That burden has not been met.

Respectfully submitted,

VARDAMAN S. DUNN
Post Office Box 1046
Jackson, Mississippi 39205
Attorney of Record for Respondents

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

ALF KEY, et al
Appellant—Petitioner

WILLIAM C. KEADY, United States District Judge for the Northern District of Mississippi, et al.
Appellee—Respondent

No. 76-452

To Hon. Vardaman S. Dunn, Counsel for Appellee—Respondent:

YOU ARE HEREBY NOTIFIED that an appeal—a petition for a writ of certiorari—in the above-entitled and numbered case was docketed in the Supreme Court of the United States on the 28th day of September 1976.

At the request of the Clerk of the Supreme Court, we are sending attached hereto an appearance form to be filed by you, or other counsel who will represent your party, with the Clerk at or before the time you file your response to our petition or jurisdictional statement.

Charles M. Murphy, Jr.
Counsel for Appellant—Petitioner

308 Dermon Building
Number and Street

Memphis, Tennessee 38103
City, State and Zip Code

NOTE: Please indicate whether the case is an appeal or a petition for certiorari by crossing out the inapplicable terms. A copy of this notice need not be filed in the Supreme Court.

CO-75

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-452

ALF KEY, ET AL., PETITIONERS

v.

WILLIAM C. KEADY, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF MISSISSIPPI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

We invite the Court's attention to the following facts which show that the petition for a writ of certiorari was filed out of time. The final order[1] of the court of appeals (the denial of a petition for rehearing) was entered on June 28, 1976. The time for filing a petition for a writ of certiorari was not extended, and, accordingly, the 90-day period provided by 28 U.S.C. 2101(c) for petitioning in civil cases expired on September 27, 1976. The petition was filed on September 28, 1976. Since the time limit specified by 28 U.S.C. 2101(c) is jurisdictional, the petition should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1976.

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[1]This case involves the denial of a petition for a writ of mandamus. Therefore, no judgment was entered.

DOJ-1976-12